

Both respondent and the State Insurance Fund of Oklahoma (Oklahoma Fund), after filing separate appeals, contend that the parties are not covered by the Kansas

Workers Compensation Act. Additionally, respondent raises the question of whether the provisions of K.S.A. 44-506 should be interpreted and applied to the employment contract, therefore, requiring the parties to litigate this dispute in Oklahoma.

The Oklahoma Fund disputes whether the Kansas Division of Workers Compensation has jurisdiction over the Oklahoma Fund and, further, whether, in this instance, the workers' compensation insurance policy of the Oklahoma Fund provides workers' compensation coverage for claimant's alleged injury.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds that the Award of the Administrative Law Judge dated May 18, 2000, should be affirmed and the Nunc Pro Tunc of the Administrative Law Judge dated May 25, 2000, should be reversed.

Claimant, a craft inspector, was hired by respondent to perform work in Roswell, New Mexico. Claimant testified he was first contacted by telephone by respondent's representative, Jerry Lorette, on October 4, 1995, while claimant was at home in Hutchinson, Kansas. During that telephone conversation, Mr. Lorette offered claimant a job with respondent, and claimant accepted. It was agreed that claimant would report to work at 7:00 a.m. on October 6, 1995, in Roswell, New Mexico. Claimant's pay started from the time he left Hutchinson, Kansas. Claimant departed Hutchinson, Kansas, on October 4, 1995. He traveled to Roswell, New Mexico, arriving there the evening of October 5, 1995. He reported to the offices of respondent in Roswell, New Mexico, contacting B. F. Sadler, the chief inspector for respondent in that area. Claimant was provided specific construction specifications and certain agreements between respondent and Mid-America Pipeline Company, the general contractor on the job. Claimant immediately began working for respondent in Roswell, New Mexico.

On October 12, 1995, while working, claimant stepped into a hole and twisted his ankle. He also injured his low back.

As above stated, the issues dealing with the nature and extent of claimant's injury and/or disability, as well as claimant's entitlement to outstanding medical expenses and future medical treatment, were resolved by the parties, with those issues withdrawn from consideration by the Board. Therefore, a recitation of the facts regarding claimant's medical treatment is unnecessary in this Order. The issues for consideration by the Appeals Board deal with the events which led up to claimant's hire and what, if any, contractual and/or jurisdictional provisions control or affect claimant's entitlement to workers' compensation benefits under the Kansas Workers Compensation Act.

First, the Board must decide whether the Kansas Workers Compensation Act applies to this situation. K.S.A. 44-506 states that:

[T]he workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides . . . .

It is uncontraverted that respondent does not do business in the state of Kansas. Therefore, under K.S.A. 44-506, the Kansas Workers Compensation Act will only apply if the contract of employment was made within the state. Claimant testified he was contacted by telephone on October 4, 1995, while in his home in Hutchinson, Kansas, by a representative of respondent. During that telephone conversation, an offer of employment was made to claimant and claimant accepted that offer of employment. Additionally, claimant's pay began the moment he left from Hutchinson, Kansas, to travel to respondent's job location in Roswell, New Mexico.

A basic principle of law is that a contract is "made" when and where the last act necessary for its formation is done. Shehane v. Station Casino, 27 Kan. App. 2d 257, 3 P.3d 551 (2000); Smith v. McBride & Dehmer Construction Co., 216 Kan. 76, 530 P.2d 1222 (1975).

When that act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance. Morrison v. Hurst Drilling Co., 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973); see Restatement (Second) of Contracts § 64, Comment c (1974).

The acceptance of the offer of employment during the telephone conversation between claimant and Mr. Loret, respondent's representative, while claimant was in his home in Hutchinson, Kansas, resulted in a contract being "made" in the state of Kansas. The Appeals Board finds that the Kansas Workers Compensation Act applies to this injury. The Appeals Board finds that K.S.A. 44-506 does not require that this dispute be litigated in Oklahoma, but may be resolved in Kansas.

The Appeals Board must next decide what, if any, authority it has over the Oklahoma Fund. The Oklahoma Fund was not organized under the laws of the state of Kansas and is not authorized to transact any business in Kansas.

The Administrative Law Judge, in her Nunc Pro Tunc order, modified her original award, which assessed liability against both respondent and the Oklahoma Fund, with the Nunc Pro Tunc order assessing the award against only the respondent. The Administrative

Law Judge had, in the Award, decided that the Kansas Workers Compensation Act had no jurisdiction over the Oklahoma Fund.

During the litigation of a workers' compensation claim, the administrative law judge must decide whether there is an insurance carrier and, in the case of multiple insurers, which is at risk. Two pretrial questions to be answered in every workers' compensation case are: "Did the respondent have an insurance carrier on the date of the alleged accident? What is the name of the insurance company?" K.A.R. 51-3-8. If the matters are not agreed upon, they then become issues for determination by the administrative law judge. Helms v. Tollie Freightways, Inc., 20 Kan. App. 2nd 548, 889 P.2d 1151 (1995).

The primary purpose of the Workmen's Compensation Act is to expeditiously provide an award of compensation in favor of an injured employee against all persons who may be liable therefor. **As to questions concerning the responsibility for payment under this general liability, the employee is not concerned.** Such questions are to be resolved by a court in an independent action unless otherwise specifically provided by statute. Kuhn v. Grant County, 201 Kan. 163, 169, 439 P.2d 155 (1968). (Emphasis added.)

The respective liabilities of different insurance carriers is not to be decided in a workers' compensation proceeding unless the employee's interests are involved. American States Ins. Co. v. Hanover Ins. Co., 14 Kan. App. 2nd 492, 794 P.2d 662 (1990).

In this instance, the dispute is not whether claimant suffered a work-related accidental injury, but whether the Kansas Act applies, which the Board has already above decided. A further question is whether the respondent or the Oklahoma Fund or both are responsible. For this Board to delve into the Oklahoma Fund's contract with respondent would frustrate the purpose of the Act, i.e., to expeditiously provide an award of compensation in favor of an injured employee against all persons who may be liable therefor. Kuhn, *supra*, at 169.

In a dispute between contesting insurance carriers, it has been held that compensation should be awarded against both disputing carriers, jointly and severally, with their respective rights to be determined in a separate, independent action. Hobelman v. Krebs Const. Co., 188 Kan. 825, 366 P.2d 270 (1961). Similarly, the Appeals Board finds a dispute between a respondent and its insurance company should be dealt with accordingly, where the coverage issue is not determinative of the employee's interests.

The Appeals Board finds both respondent and its insurance carrier to be subject to the provisions of the Kansas Workers Compensation Act. The Award of the Administrative Law Judge and the Nunc Pro Tunc order granting claimant benefits against respondent for

the accidental injury occurring on October 12, 1995, in Roswell, New Mexico, should be thus modified.

The disputes arising between the respondent and the Oklahoma Fund as to the contractual relationship between them may then be resolved in a court of competent jurisdiction.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated May 18, 2000, as modified by the Nunc Pro Tunc order of May 25, 2000, should be, and is hereby, modified, and an award is granted in favor of the claimant, Earl Eugene Abbey, and against the respondent, Cleveland Inspection Services, Inc., and its insurance carrier, the State Insurance Fund of Oklahoma, for an accidental injury occurring on October 12, 1995, and based upon an average weekly wage of \$1,153.85.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the orders contained herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James B. Zongker, Wichita, KS  
Edward D. Heath, Jr., Wichita, KS  
Gary A. Winfrey, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director